

## Legal Analysis on Gross Violation of Human Rights in Paniai (Part 1)

### Legal Issues in the Indictment of the Paniai Case

On Wednesday, September 21, 2022, the Human Rights Court, held at the Makassar District Court, began proceedings for its first case in eighteen years. The Court is tasked with evaluating the culpability of Major Inf (Ret.) Isak Sattu (IS) in the December 8, 2014 Paniai Incident. After four Papuans were beaten by members of the TNI the day before, December 7, at Pondok Natal Gunung Merah in Paniai, Papua, hundreds of Papuans protested against the Indonesian security forces. TNI members from Koramil 1705-02/Enarotali in the Paniai Regency shot into the crowd of Papuan demonstrators, killing four high school students and injuring 21 Papuans. On the basis of testimony at the trial it remains an open question as to whether units of other Indonesian forces also participated in the shootings. The Defendant, a retired TNI-AD liaison officer for Kodim 1705/Paniai, is charged with criminal liability under the doctrine of command responsibility for the actions committed by his alleged subordinates (crimes against humanity in the form of murder and persecution).

The trial commenced with the reading of the indictment. The contents of the indictment have raised several concerns regarding the prosecution's application of Law Number 26 Year 2000, as well as relevant international legal doctrines in proving its case. In this analysis, we discuss some of the challenges within the indictment related to proving the contextual elements of crimes against humanity and meeting the elements of murder and persecution as crimes against humanity. We also point to the need for judges in the Indonesian Human Rights Court to decide how to apply the relevant international jurisprudence and international criminal law that defines crimes against humanity and command responsibility, specifically as they pertain to murder, *mens rea* requirements, and the existence of an organizational policy.

### The Applicable Law

Indonesian Law No. 26/2000 was passed by the People's Representative Council of Indonesia on November 23, 2000. The elucidations of the crime of genocide and crimes against humanity in Law No. 26/2000 were formulated to be in accordance with how these crimes are defined and applied in the Rome Statute of the International Criminal Court (ICC), which came into force in July 2002.

The Supreme Court of Indonesia has acknowledged that Law No. 26/2000 adopts the formulation of specific international crimes and international criminal law doctrines as set in the Rome Statute of the ICC in its guidebook on the elements of gross human rights violations and command responsibility ("Guidelines on the Elements for Criminal Acts of Gross Human Rights

Violations and Command Responsibility,” or *Pedoman Unsur-Unsur Tindak Pidana Pelanggaran HAM yang berat dan Tanggung Jawab Komando*) published in 2006. Specifically, the Supreme Court stated that Law No. 26/2000 adopts the crimes of genocide, crimes against humanity, and the modes of liability of command/superior criminal responsibility as defined and developed under the jurisprudence of international criminal law. In this way, the Supreme Court of Indonesia has made it clear that the jurisprudence and case law of the contemporary international criminal tribunals, under international customary law, should be drawn upon when interpreting and applying Law No. 26/2000.

### **Failure in Proving the Contextual Elements of Crimes Against Humanity**

At the outset, it is important to recognize that prosecution of crimes against humanity differs in important ways from prosecution of ordinary crimes under domestic law. Such cases typically involve multiple victims, institutionally-organized perpetrators operating in an official capacity, multiple victims and crime scene, as well as a context of ongoing conflict and violence which may be broad in temporal and geographical scope. The participation of military, police, or security forces, or of officially sanctioned paramilitary or militia groups, is also typical of such cases and presents unique challenges in investigation and prosecution. In the case of Indonesia, the challenges that the Jakarta Ad Hoc Human Rights Courts faced while hearing 12 cases involving the violence in East Timor in 1999 are well-known.

Apart from the systemic issues noted above, the application of the legal doctrines defining international crimes may also present challenges to judges, prosecutors, and defense counsel who have little or no experience with such cases and doctrines. For this reason, we briefly review the basic requirements of proof in order to meet the legal requirements for crimes against humanity.

In order to successfully prove a case of crimes against humanity, the prosecution must first establish what are known as the contextual, or *chapeau*, elements before considering the underlying offense of the particular crimes charged – in this case, murder and persecution as crimes against humanity. If any one of the required contextual elements is not proved beyond a reasonable doubt, then the case fails and there is no need to consider the elements of the underlying alleged crimes.

Crimes against humanity thus have two kinds of common elements that distinguish them from ordinary crimes. The first are the objective elements. The alleged acts of murder or persecution must have been committed as part of a **widespread or systematic attack directed against a civilian population**. Each word in this formulation has been the object of extensive international jurisprudence at the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Court (ICC), and other international or international hybrid criminal tribunals.

In order to establish that an attack against a civilian population occurred, the prosecution must prove beyond a reasonable doubt that the general context, of which the charged offenses are a part, constituted an attack because it involved violence, force, or coercion, though not

necessarily of a military nature. The prosecution must further prove that a civilian population was the primary object of the attack and that the persons attacked constituted (a) a population rather than some random individuals and (b) that population or group of persons were civilian in nature. A “civilian population” is defined as a group of persons that can be specifically identified by a shared characteristic; it does not mean an entire population of a city or a country. The presence of military or militia personnel among a civilian population does not deprive it of its civilian character.

Finally, the attack must be either widespread or systematic, the former referring primarily to the quantitative or geographical scope of the attack, the latter to its organized nature, often manifested by a pattern of similar criminal activity in different places or times. Jurisprudence from the ICTY defines “attack” as a “course of conduct involving the commission of acts of violence,” not one particular act. Jurisprudence from the ICC shows that “widespread” can be proven when the evidence shows that “the attack was massive, frequent, [and] carried out collectively with considerable seriousness and directed against a large number of civilian victims.” The *Kordic* and *Cerkez* Trial Chambers of the ICTY noted that the widespread and systematic elements were used to illustrate that an individual was victimized because of their membership of a targeted civilian population, rather than for their individual attributes.

In addition to the objective elements, the prosecution must establish the subjective element, or *mens rea*, beyond a reasonable doubt. To satisfy this element, the prosecution must show that the perpetrator **knew** that the crime with which he or she is charged was part of, or intended to be part of, the widespread or systematic attack directed against a civilian population. In other words, the accused must have been aware that their conduct was part of, or connected to, the broader context of violence constituting the attack. In the typical context in which crimes against humanity occur, there is a general awareness of previous or ongoing conflict or violence that precludes the accused from claiming that they didn’t know that their conduct was part of that broader context. For example, the fact that the victims of the crimes with which the accused is charged were members of the same ethnic, religious, or political group constituting the civilian population under attack would provide evidence that the accused targeted such persons because of that connection and, hence, was aware that their conduct was part of the broader attack. The broad scope or notoriety of the attack and that news of the events that constituted it was widely disseminated would provide circumstantial evidence that the accused must have been aware of the attack. Evidence about his particular location, affiliation, and duties could also provide such evidence. Thus, circumstantial evidence, as well as direct evidence, can be used to prove the contextual elements.

These elements, which indicate the nature of such criminal conduct, distinguish crimes against humanity from ordinary crimes. Crimes against humanity are considered among the most serious international crimes because they involve organized violence that targets a civilian population, rather than random acts or isolated incidents of violence. The fact that it is typically state organized or sanctioned violence underscores the seriousness of the deliberate targeting of civilian populations. The prosecution cannot prove the underlying crimes defined in Article 9 of Law No. 26/2000, such as murder and persecution, as crimes against humanity without first

proving each of the elements enumerated above that demonstrate the existence of a widespread or systematic attack directed against a civilian population.

In the specific context of this case, the prosecution has to provide evidence that the TNI or other security units have been involved in operations or interaction with civilian groups employing violence, coercion, armed force or the threat of such force, directed against a civilian population in Papua in the period prior to December 8, 2014. They will also need to show that the defendant was aware that his actions were part of, or intended to be part of, this widespread or systematic attack directed against a civilian population. Establishing this context is requisite for them to demonstrate that the underlying charges that the indictment alleges – murder and persecution – are crimes against humanity.

One of the most serious defects of the indictment, however, is that it conflates the contextual elements of crimes against humanity with the crimes charged. The indictment presents the actions of the accused as being widespread or systematic in and of themselves. This is legally irrelevant because the actions of the perpetrators do not need to be widespread or systematic, but can consist of a single act. Only the events that constitute the broader temporal and geographical context prior to the commission of the alleged crime against humanity need to be proven to be widespread or systematic. The indictment's failure to delineate the contextual elements of crimes against humanity from the alleged murder of which the defendant is accused calls into question the prosecution's ability to establish the crimes of murder and persecution as crimes against humanity, rather than as ordinary crimes. The indictment also fails to properly allege the required *mens rea* requirement for the contextual elements. It must be underscored that the prosecution must provide **both** the *mens rea* for the contextual elements as well as the *mens rea* requirements for each of the specific offenses charged, murder and persecution.

### **The Failure in Proving Command Responsibility**

An additional serious defect of the indictment is its failure to accurately allege the defendant's command authority. The proof of such command authority is the core of command responsibility as a mode of liability. As it is the only mode of liability alleged by the indictment, its proof is essential to the success of the prosecution's case.

Command authority can be either *de jure* or *de facto*. What is decisive is that in order to establish *de facto* command authority the prosecution must show that the direct perpetrators were subordinates of the defendant because he or she had **effective control** over the individuals that directly committed the crimes charged. The proof of *de jure*, or formal, authority, is not sufficient if the defendant did not have effective control over the alleged subordinates. Effective control is defined as the power to prevent or punish the crimes charged. Based on the facts alleged in the indictment, in the present case the prosecution will be challenged even to prove that the defendant had *de jure* control over the other troops in the same unit due to his position as a liaison officer. The indictment does not illustrate his responsibilities as being those of a field commander who would have formal control over his troops. Instead, the indictment lists his responsibilities associated with being a liaison officer as coordinating policies of the

Military District Commander (*Dandim*) with members of the regional government and the Military Subdistrict Commander (*Danramil*).

In addition, the indictment fails to allege that the soldiers viewed the defendant as having *de facto* control over them. In fact, the indictment seems to allege that the defendant was a mere observer of the soldiers' preparations preceding the attack. The indictment states that the defendant "saw and let" members of Koramil 1705-02/Enarotali take firearms and sharp bullets from the armory. This wording presents two alternative theories of command: first, that another commander instructed the soldiers to take these weapons; or second, that these members of Koramil 1705-02/Enarotali were an unruly mob who directed themselves to take firearms and sharp bullets from the armory. Both of these theories of command make it challenging for the prosecution to show that the defendant had effective control over the soldiers. The indictment's failure to explicitly state who directed the soldiers to take the weapons out of the armory is a fatal omission. The allegation that the accused "let" soldiers take weapons from the armory is irrelevant for purposes of command responsibility if it cannot be proved that he would have had the authority to prevent them from doing so. The factual situation described in the indictment might be potentially relevant for aiding and abetting as a mode of individual responsibility, but this theory was not alleged or referenced in the indictment.

Notably, the indictment only alludes to a sense of command authority by using one quote from an unidentified individual, who refers to the defendant as "our commander" *after* taking firearms from the armory and shooting warning signs into the air. In addition, the indictment does not include any response made by the defendant when members of Koramil 1705-02/Enarotali asked for orders in response to their base being attacked, just before the fatalities occurred. The indictment seems to assume that if the defendant had issued a command, the members of Koramil 1705-02/Enarotali would have obeyed. However, the indictment fails to indicate what facts support this premise. Evidence would have to be introduced at trial that establishes such *de facto* command authority beyond a reasonable doubt.

### **The Absence of Reference to International Jurisprudence in Interpreting Crimes under Law No. 26/2000**

#### *Murder as a Crime Against Humanity*

The prosecution uses Law No. 26/2000's definition of crimes against humanity in its indictment, rather than the definition established by the ICC Rome Statute. This difference in definition raises concerns regarding the appropriate evidentiary and legal standards the judges should adopt when evaluating elements of the crimes, namely murder, *mens rea*, and the existence of a state or organizational policy. In resolving these conflicts, it should be re-emphasized that the Indonesian Supreme Court has affirmed that provisions in Law No. 26/2000 are based on the Rome Statute and should be interpreted according to international jurisprudence. Therefore, the judges have the authority to use international customary law and jurisprudence in instances where the language in Law No. 26/2000 differs from or omits key elements.

The qualification of Article 9(a) of Law No. 26/2000 states that, to prove murder as a crime against humanity, the prosecution must adhere to the elements of murder as per Article 340 of the Indonesian Criminal Code – which is premeditated murder. However, international case law from the ICTY, the ICC, and the other international criminal tribunals have established that premeditation is not a requirement for proving murder as a crime against humanity. Rather, murder as a crime against humanity is defined as an intentional killing. This jurisprudence was further reinforced during the trials in the Jakarta Ad Hoc Tribunal for East Timor, whereby premeditation was not a requirement for convicting individuals of murder. Those convictions were not reversed on the grounds that they did not prove premeditation. The decision to adhere to international jurisprudence follows the guidance set forth in the Supreme Court Guidelines on the Elements for Criminal Acts of Gross Human Rights Violations and Command Responsibility.

Consequently, to evaluate the accusation of murder as a crime against humanity, the judges must:

1. determine whether the prosecution has sufficiently established that the crimes that occurred were part of a widespread or systematic attack against a civilian population;
2. evaluate whether there is sufficient evidence to establish that killings over one or more persons were occurred; and
3. evaluate whether the alleged killings were intentional.

“Killings” in this case is equivalent to causing death to another person. Following this, the judges would need to examine if there is sufficient evidence that the defendant can be held liable for these killings under the doctrine of command responsibility.

The absence of a *mens rea* requirement to prove the crimes against humanity in Article 9 of Law No. 26/2000 requires the judges to refer to the Rome Statute’s more specific elucidation of this element. Per Article 7 of the Rome Statute, the prosecution must show that at the time that the alleged murders occurred, the defendant was fully aware of both the widespread or systematic attack against the civilian population, and that these crimes were part of this widespread or systematic attack. Furthermore, Article 7 in the Elements of Crimes of the Rome Statute states that clarifying the perpetrator’s participation and knowledge of a widespread or systematic attack against a civilian population requires the prosecutor to show that “the perpetrator intended to further such an attack,” not that he had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State organization. The term “perpetrator” was clarified in the *Galic* Appeals Chamber judgment in the ICTY to mean the “accused,” not the direct perpetrators.

The indictment, however, does not allege the *mens rea* requirement that the defendant knew that the killings were part of a widespread or systematic attack. The language in the indictment makes it challenging for the prosecution to show that these are crimes against humanity, rather than ordinary crimes.

The judges will also need to determine which standards to implement when examining the existence of a policy as an element of crimes against humanity. The ICC Rome Statute’s

conception of crimes against humanity in Article 7(2) states that an attack directed against any civilian population must be “pursuant to or in furtherance of a State or organizational policy.” This means that evidence of a clearly defined government policy whose aim is to render harm to a civilian population is a necessary element to classify an act as a crime against humanity. Law No. 26/2000, however, does not have language clarifying whether or not a government policy is a legal requirement to prove crimes against humanity. In the absence of this specific language in Law No. 26/2000, it is appropriate for the judges to turn to the more detailed language of the Rome Statute and international jurisprudence as the standard by which to interpret the facts of this case. This may prove to be a challenging issue to resolve because the jurisprudence of the ICTY, ICTR, and other tribunals provides that a governmental policy is not a required element under international customary law. This is a prerequisite to determining whether the widespread or systematic attacks against a civilian population were implemented pursuant to a particular government or organizational policy. The question of whether or not the element of a governmental policy is required is one example of issues where Human Rights Court judges will have to interpret and resolve conflicts between the jurisprudence of the ICC and international customary law doctrines as articulated in the decisions of the other international criminal tribunals.

#### *Persecution as a Crime Against Humanity*

The indictment’s allegation of persecution as a crime against humanity does not correctly articulate the elements of the crime of persecution. In part, this failure derives from confusion related to the translation and formulation of the crime of persecution in Law No. 26/2000. Indeed, the word “penganiayaan” used to define the crime of persecution in Article 9(h) of Law No. 26/2000 has been confused with “penyiksaan,” or “torture/assault,” and “penelantaran atau perlakuan semena mena,” which roughly translates to mistreatment. This mistranslation has encouraged the formulation of the crime of persecution to adhere to the formulation in Articles 351-358 of the Indonesian Criminal Code, which refer to a physical assault of an individual. The Supreme Court in its guidebook has provided a more accurate interpretation in the same manner as the Rome Statute’s interpretation. The understanding of persecution against members of specified groups in the Rome Statute has a wider definition involving any discriminatory treatment that results in mental, physical, or other forms of harm. During the Jakarta Ad Hoc Human Rights Court for East Timor, the prosecution also confused persecution with torture. The judges will thus need to carefully interpret this article in accordance with international jurisprudence and international criminal law.

Under the Rome Statute, alleging the crime of persecution requires proving several elements, as follows:

1. The judges must determine whether the perpetrator has intentionally and severely deprived one or more persons of their fundamental rights because of the persons’ group identity. Group identity is defined as being based on political, racial, national, ethnic, cultural, religious, or gender grounds, as well as other grounds universally recognized.
2. The elements of the Crime Against Humanity of Persecution in the Rome Statute, Article 7 (1) (h) (4) states that, “The conduct [that is alleged of being persecution] was committed in connection with any act referred to in Article 7, paragraph 1, of the Statute

of any crime within the jurisdiction of the Court.” This means that persecution cannot be a stand-alone offense. Therefore, proving this crime requires showing that another crime under the jurisdiction of the Court was committed with a particular discriminatory intent, on the grounds of a person’s group identity as specified under the article.

However, in the indictment, the prosecution has demonstrated their misunderstanding of the crime of persecution by confusing it with other crimes against humanity defined in Article 7 of Law No. 26/2000, such as inhumane acts and torture. Specifically, the indictment has failed to allege that the underlying offense of murder was committed with a specific intent to harm an individual based on their group affiliation. The indictment does not establish the defendant’s specific discriminatory intent in committing a crime because of the characteristic of the specific group that was targeted. More fundamentally, the indictment fails to connect this discriminatory intent to the alleged murder. The Indictment merely states that the non-fatal wounds of 10 individuals was a result of persecution. However, the indictment fails to allege how these non-fatal wounds may be attributed to a crime against humanity to which persecution could be connected.

The prosecution has to demonstrate the connection between crimes against humanity alleged in the indictment, and the discriminatory intent required to prove persecution. The judges will need to determine how to interpret the elements of the crime of persecution, and to evaluate if the prosecution presents evidence satisfying these elements. Because Law No. 26/2000 does not specify in its elucidation of Article 9 that persecution must be committed in connection with another crime, the elucidation articulated in the Rome Statute, which had been adopted also in the Supreme Court’s guidebook, needs to be referred to and assessed when deciding whether the prosecution has proved all of the required elements of persecution.

### **Issues Arising from Indicting a Single Suspect**

A notable weakness in the indictment is the prosecution’s failure to charge other defendants, including the direct perpetrators. The indictment’s narrative of events refers to numerous members of the TNI who, in one way or another, were involved in the events in Paniai connected to the commission of the alleged killings. In some cases, the indictment fails to identify these individuals by name, rank, or military unit. In other cases, involving several commissioned officers, their names and ranks are specified, but there is no or insufficient information as to their command authority or military role in connection with Koramil 1705-02/Enarotali. Further, the indictment provides facts suggesting that these officers had reason to know or should have known that crimes were likely to, or were in fact, being committed. It is worth noting that the Komnas HAM *pro-justitia* inquiry report to the Attorney General identified multiple individuals suspected of being involved in crimes against humanity committed at Paniai. However, none of these individuals have been charged or specifically identified in the indictment.

The indictment also fails to charge other individuals in connection with crimes committed at the incident, whether for aiding and abetting or under a theory of superior responsibility. Article 25 (3)(c) of the Rome Statute on individual criminal responsibility establishes the elements of aiding

and abetting as assistance with the commission of the crime. Based on this, the indictment alleges facts that, if proved beyond a reasonable doubt, might provide sufficient evidence to implicate other individuals with aiding and abetting. This includes members of the Indonesian police whom the indictment identifies as playing various roles in the events that unfolded on December 7 and 8, 2014.

Notably, the indictment fails to include any relevant charges against the defendant or other individuals for the events that took place on December 7, 2014. The indictment describes how members of the TNI beat several children who were participating in a Christmas celebration at Pondok Natal Gunung Merah. The indictment alleges that the TNI members involved in these crimes were coming from the direction of Enarotali. A parent of one of the witnesses reported these beatings to the Paniai police immediately following the beatings. The events of December 7, 2014 indicate that there were members of the TNI in Paniai who showed a violent disposition toward civilians. It also indicates that there were members of the Paniai police, and the TNI, who could have reason to know that more violence was likely to be committed. However, the indictment fails to draw critical connections between the beatings on December 7, and the murders on December 8. In fact, the prosecution does not charge the defendant, or any other individual, for their role or involvement in the events of December 7, 2014. This omission from the indictment not only makes it more challenging for the prosecution to prove persecution as a crime against humanity, but also demonstrates the prosecution's lack of understanding of how to prove the *chapeau elements*.

In summary, our analysis shows the numerous failures within the indictment to accurately and fully allege murder and persecution as crimes against humanity, as well as the single defendant's command authority over the direct perpetrators of the Paniai incident. The indictment failed to illustrate how the event of December 8, 2014 constituted a part of a widespread or systematic attack directed against a civilian population, which must be proved beyond a reasonable doubt in order to demonstrate that the underlying offenses are crimes against humanity. Furthermore, the indictment's failure to accurately allege murder and persecution as crimes against humanity has made the prosecution's task in proving their case during the trial challenging, to say the least. We will see how the judges have considered these issues and applied the relevant international criminal doctrine when the court judgment is read on December 8.

The reading of the judgment will be broadcasted through the Makassar District Court YouTube channel, which can be accessed here:

<https://www.youtube.com/@PengadilanNegeriMakassar/streams>